In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-242

DONALD K. GEARHEART AND
RICHARD KURTZ, PETITIONERS

v.

FEDERAL RESERVE BANK OF CLEVELAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners purchased certificates of deposit in face amounts of $10,000 at the respondent Provident Bank. The rate of interest allowed on their certificates was limited by Regulation Q of the Federal Reserve Board, 12 C.F.R. 217.7, which imposes a maximum rate of interest on certificates of deposit of less than $100,000 purchased at member banks.

After their purchase, petitioners instituted this action in the United States District Court for the Southern District of Ohio, challenging the validity of Regulation Q on the ground that the imposition of

interest limitations only as to smaller certificates of deposit denies due process. The complaint also claimed that compliance with Regulation Q by the nonfederal respondents[1] violates 42 U.S.C. 1983 and 1985(3), as well as several sections of the federal securities laws and federal antitrust laws (see Pet. App. A, pp. 2a–8a). The district court dismissed petitioners' complaint with prejudice for failure to state a claim upon which relief can be granted (Pet. App. A, pp. 1a–39a). The court of appeals affirmed *per curiam* (Pet. App. B, pp. 40a–43a). Petitioners reiterate their principal claims here.

1. Petitioners contend that Regulation Q contains a "suspect classification" based on wealth (Pet. 5). But, as petitioners apparently concede (Pet. 6–7), the appropriate standard of review must focus on whether the classification has a reasonable basis. This Court has never held that statutes bearing on the wealth of an individual are by that fact alone subject to strict judicial scrutiny. See *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 29. The cases in which this Court has strictly scrutinized classifications based on wealth dealt with statutes that conditioned the exercise of a fundamental right on the ability to pay for it. See *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802; *Shapiro* v. *Thompson,* 394 U.S. 618; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663; *Douglas* v. *California,* 372 U.S. 353. Regulation Q's limitation on rates of interest does not burden the exercise of any fundamental right (see Pet. App. B,

[1] The respondent banks are members of the Federal Reserve System required to comply with Regulation Q.

p. 42a). The regulation therefore must be sustained if it is "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487; see *Richardson* v. *Belcher*, 404 U.S. 78, 81; cf. *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

The court of appeals was correct in holding (Pet. App. B, p. 42a) that Regulation Q is rationally based. Regulation Q is designed to control competition for deposits between banks and savings and loan institutions so as to insure a flow of funds to the home mortgage market while at the same time permitting banks to attract funds needed to service commercial borrowers (Pet. App. A, pp. 12a–16a; Pet. App. B, p. 42a). This is a legitimate and permissible goal, and Regulation Q is a well-tailored means to that end.

Petitioners appear to concede that Regulation Q is rationally based (see Pet. 7). But they contend that the courts did not consider whether the regulation was invidious. The district court did address the question, however, and correctly determined that petitioners' allegations of invidious discrimination were conclusory and factually unsupportable (Pet. App. A, pp. 17a–18a). The district court's careful survey of the administrative history of Regulation Q revealed no evidence of an impermissibly discriminatory intent.

2. Petitioners also contend that compliance with Regulation Q by respondent banks is a deprivation under color of state law of the constitutional rights of purchasers of certificates with face values less than $100,000 (Pet. 8). This claim fails for two reasons. First, since Regulation Q is not unconstitutional, compliance with its requirements is perforce not a depri-

vation of constitutional rights (see Pet. App. A, p. 18a; Pet. App. B, p. 42a). Second, compliance with Regulation Q is not under color of state law. Regulation Q is a federal regulation, and this Court has held that the relevant inquiry in this regard is "whether there is a sufficiently close nexus between the State and the challenged action * * * so that the action * * * may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.* 419 U.S. 345, 351. Detailed and extensive regulation of the banking industry by the states, such as petitioner has shown (Pet. 9–11), is not by itself sufficient to convert all bank activities into acts taken under color of state law. See *Jackson* v. *Metropolitan Edison Co., supra; Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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